February 23, 2000

VIA ELECTRONIC &
REGULAR MAIL

Mr. Tom Fry
Acting Director
Bureau of Land Management
Department of Interior
1849 C Street, NW
Room 5660
Washington, DC 20240
Facsimile (202) 208-5242

Re: Mining Claims Under General Mining Laws; Surface Management

Dear Mr. Fry:

The Office of Advocacy of the U.S. Small Business Administration (SBA) was established by Congress under Pub. L. No. 94-305 to represent the views of small business before federal agencies and Congress. Advocacy is also required by the Regulatory Flexibility Act (RFA) to monitor agency compliance with the RFA. 5 U.S.C.§ 612. The Chief Counsel of Advocacy is authorized to appear as *amicus curiae* in regulatory appeals from final agency actions, and is allowed to present views with respect to compliance with the RFA, the adequacy of the rulemaking record with respect to small entities, and the effect of the rule on small entities. Id.

Background

In May 1998, the United States District Court for the District of Columbia found that the Bureau of Land Management (BLM) violated the requirements of the RFA by using an alternative size standard without consulting with SBA and the Office of Advocacy prior to promulgating a rule on reclamation bonds for the mining industry. The court remanded the rule to the agency for procedures consistent with its opinion. *See* Northwest Mining v. Babbitt, 5 F. Supp.2d 9 (D.D.C., 1998).

Pursuant to the court order, on February 9, 1999 the Bureau of Land Management (BLM) published a proposed rule in the Federal Register on *Mining Claims Under General Mining Laws; Surface Management*. Federal Register, Vol. 64, No. 26, p. 6422. The purpose of the proposed rule was to revise BLM's regulations governing mining operations involving metallic and some other minerals on public lands administered by BLM. BLM stated that the purpose of the proposed regulations was to prevent unnecessary or undue degradation of BLM-administered lands by mining operations authorized by mining laws. The Office of Advocacy submitted timely

comments on the proposal on May 10, 1999. Advocacy incorporates those comments by reference.

Subsequent to the closing of the comment period, Congress ordered BLM to provide at least 120 days for public comment on the National Academy of Sciences (NAS) report on environmental and reclamation requirements relating to mining on public lands that Congress ordered BLM have prepared. 64 FR 57613, at 57614. On October 26, 1999, the Bureau of Land Management (BLM) published a supplemental proposed rule and reopened the comment period on the NAS study recommendations for *Mining Claims Under General Mining Laws; Surface Management*. Id. at 57613. At that time, BLM also reopened the comment period on the RFA section of the proposal. Id., at 57618. This comment will focus specifically on BLM's treatment of the RFA in the supplemental proposed rulemaking.

National Academy of Science Study

In the study, the NAS draws several conclusions about the environmental and reclamation requirements relating to mining on public lands. It also makes several recommendations to address the concerns raised in the study. The conclusions and recommendations are provided below.

NAS's Conclusions

NAS concluded that existing regulations are generally well coordinated, although some changes are necessary. The overall structure of the federal and state laws and regulations that provide mining-related environmental protection is complicated, but generally effective. It stated that conclusions that address overall environmental efficiency and program efficiency include:

(1) Federal land management agencies regulatory standards for mining should continue to focus on the clear statement of management goals rather than defining inflexible, technically prescriptive standards. Simple "one-size-fits-all" solutions are impractical because mining confronts too great an assortment of site-specific technical, environmental, and social conditions. Each proposed mining operation should be examined on its own merits.

(2) If backfilling of mines is to be considered, it should be determined on a case-by-case basis, as was concluded by the Committee on Surface Mining and Reclamation (COSMAR) report (NRC, 1979). Site-specific conditions are too variable for prescriptive regulation.

(3) The Bureau of Land Management (BLM) and the Forest Service need not have identical regulations, but some changes are warranted. The two agencies have broadly similar land management mandates. There are, however, some differences in the kinds of lands they manage, in their specific responsibilities, and in their organization. Whereas some of the Committee's recommendations would make

the agencies' approaches to regulating hardrock mining more similar, the Committee is not suggesting that uniformity in all aspects is necessary.

(4) Some small mining and milling operations present environmental risks and potential financial liabilities for the public. These exposures are small by comparison to large operations, but as currently regulated they constitute a disproportionate share of the problems for the land management agencies.

(5) Current regulations do not provide land management agencies with straightforward procedures for modification of plans of operations even with compelling environmental justification.

(6) Federal criteria do not distinguish between temporarily idle mines and abandoned operations. This distinction is important because mines that become temporarily idle in response to cyclical metal prices and other factors need to be stabilized but not reclaimed, whereas mines that are permanently idle need to be reclaimed.

(7) Financial risks to the public and environmental risks to the land exist whenever secure financial assurances are lacking.

(8) Current regulations discourage reclamation of abandoned mine sites by new mine operators. New mineral deposits are commonly found at the sites of earlier mines. Even though the operator of a new mine may volunteer to clean up previous degradation, the long-term liability acquired under current regulations can be significant. As a result, non-taxpayer supported reclamation opportunities are missed and undisturbed lands may be preferentially disturbed for new mining sites.

(9) Post-mining land use and environmental protection are inadequately addressed by both agencies and applicants. The regulations and plans of operation generally specify what actions will be taken to protect water quality and what surface reclamation is to be performed for closure. However, there is inadequate consideration of protection of the reclaimed land from future adverse uses; of very long-term or perpetual site maintenance; or of rare, but inevitable, natural emergencies. [1]

The NAS further concludes that improvements in the implementation of existing regulations present the greatest opportunity for improving environmental protection and the efficiency of the regulatory process. Federal land management agencies already have at their disposal an array of statutes and regulations that for the most part assure environmentally responsible resource development, but these tools are unevenly and sometimes inexpertly applied. Specifically, it found that:

(1) The National Environmental Policy Act (NEPA) process is the key to establishing an effective balance between mineral development and environmental protection.

[1] National Research Council, Hardrock Mining on Federal Lands, pp.89-91.

The effectiveness of NEPA depends on full participation of all stakeholders throughout the NEPA process. Unfortunately this rarely happens in a timely fashion.

(2) The Committee was consistently frustrated by the lack of reliable information on mining on federal lands. The lack of thorough information extends from that needed to characterize the lands available for mineral development to that needed to track mining and compliance with regulations. Without more and better information, it is difficult to manage federal lands properly and assure the public that its interests are protected.

(3) Deficiencies in both staff size and training were observed by the Committee in some offices of land management agencies. Increases in staffing and improved training should result in improved environmental protection and program efficiency.

(4) Forest Service permitting procedures for mineral exploration projects with limited environmental impact commonly take significantly longer than is necessary.

(5) Misunderstandings of the term "unnecessary or undue degradation" (FLPMA, 1976 [43 U.S.C. §1701 et seq.]) leave some BLM field staff uncertain whether the agency has the authority to protect valuable resources, such as riparian habitats, that may not be specifically protected by other laws.

(6) Federal land management agency representatives are inconsistent in their understanding of their enforcement authority and tools. This results from uncertain interpretations of the statutes and regulations, inadequate staff training, and deficiencies in the tools themselves.

(7) Inefficiencies and time delays in the completion of environmental review under NEPA, issuance of permits, and conduct of other administrative actions unnecessarily consume the resources and time of many stakeholders.

(8) Better information on federal lands is needed to make wise land use decisions. The land use planning process required for BLM and Forest Service lands by the Federal Lands Policy and Management Act and the National Forest Management Act, respectively, provide for identification of land and resources deserving special environmental concern.[2]

Moreover, NAS concluded that successful environmental protection is based on sound science. Improvements are needed in the development of more accurate predictive models and tools and of more reliable prevention, protection, reclamation, and monitoring strategies at mine sites. The science base is far from complete and environmental protection requires that improvements continue to be devised. Some of the most important environmental concerns at hardrock mining sites are those related to long-

[2] Id., at pp. 91-92.

term water quality and water quantity, which affect riparian, aquatic biological, groundwater, and surface water resources. A broadly coordinated, national research effort is needed to guide future development and to create improved methods for predicting, measuring, and mitigating environmental impacts related to hardrock mining.[3]

NAS further concluded that portions of the public and the mining industry have little confidence in the propriety or fairness of the regulatory and permitting system. Some members of the public perceive that regulators work too closely with the companies and permit operations without sufficient environmental safeguards. Conversely, some mining operators experience delays that they perceive to be caused, in part, by members of the public who seek to forestall mining through the permitting and regulatory processes. Lack of confidence in the regulatory and permitting system can lead to delays and higher costs for industry, regulatory agencies, and the public and can also limit opportunities for improving environmental protection.[4]

Finally, NAS found that conditions are changing for regulations and mining. Technology, social values, the economy, and scientific understanding change continually. Thus, environmental regulations applicable to mining will be most effective if they can use these changes to improve environmental protection. Similarly, the mining industry should benefit through lower operating cost and greater environmental protection. Therefore, a regulatory system that is adaptive to change will serve the public, the environment, and industry best.[5]

NAS Recommendations

NAS made several recommendations to address the issues raised by the study. Those recommendations included:

(1) Financial assurance should be required for reclamation of disturbances to the environment caused by all mining activities beyond those classified as casual use, even if the area disturbed is less than 5 acres.

(2) Plans of operations should be required for mining and milling operations, other than those classified as casual use or exploration activities, even if the area disturbed is less than 5 acres.

(3) Forest Service regulations should allow exploration disturbing less than 5 acres to be approved or denied expeditiously, similar to notice-level exploration activities on BLM lands.

(4) BLM and the Forest Service should revise their regulations to provide more effective criteria for modifications to plans of operations, where necessary, to protect the federal lands.

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[3] Id.,at p. 92.
[4] Id.
[5] Id., at p. 93.

(5) BLM and the Forest Service should adopt consistent regulations that a) define the conditions under which mines will be considered to be temporarily closed; b) require that interim management plans be submitted for such periods; and c) define the conditions under which temporary closure becomes permanent and all reclamation and closure requirements must be completed.

(6) Federal land managers in BLM and the Forest Service should have both (1) authority to issue administrative penalties for violations of their regulatory requirements, subject to appropriate due process, and (2) clear procedures for referring activities to other federal and state agencies for enforcement.

(7) Existing environmental laws and regulations should be modified to allow and promote the cleanup of abandoned mine sites in or adjacent to new mine areas without causing mine operators to incur additional environmental liabilities.

(8) Congress should fund an aggressive and coordinated research program related to environmental impacts of hardrock mining.

(9) BLM and the Forest Service should continue to base their permitting decisions on the site-specific evaluation process provided by NEPA. The two land management agencies should continue to use comprehensive performance-based standards rather than using rigid, technically prescriptive standards. The agencies should regularly update technical and policy guidance documents to clarify how statutes and regulations should be interpreted and enforced.

(10) From the earliest stages of the NEPA process, all agencies with jurisdiction over mining operations or affected resources should be required to cooperate effectively in the scoping, preparation, and review of environmental impact assessments for new mines. Tribes and nongovernmental organizations should be encouraged to participate and should participate from the earliest stages.

(11) BLM and the Forest Service should maintain a management information system that effectively tracks compliance with operating plans and environmental permits, and communicates this information to agency managers, the interested public, and other stakeholders.

(12) BLM and the Forest Service should carefully review the adequacy of the staff and other resources devoted to regulating mining operations on federal lands and, to the extent required, expand and/or reallocate existing staff, provide training to improve staff capabilities, secure supplemental technical support from inside and outside the agencies, and provide other support as necessary.

(13) BLM and the Forest Service should identify, regularly update, and make available to the public, information identifying those parts of federal lands that will require

special consideration in land use decisions because of natural and cultural resources or special environmental sensitivities.

(14) BLM and the Forest Service should plan for and assure the long-term post-closure management of mine sites on federal lands.

(15) BLM should prepare guidance manuals and conduct staff training to communicate the agency's authority to protect valuable resources that may not be protected by other laws.

(16) BLM and the Forest Service should plan for and implement a more timely permitting process, while still protecting the environment. [6]

Although BLM states that it is considering comments on all of the recommendations in the NAS study, BLM specifically states and requests comments on recommendations 1, 2, 4,5,6, and 14.[7]

The Supplemental Proposed Rulemaking Does Not Comply with the Court Order, the RFA, or Tenets of Appropriate Rulemaking

Advocacy stated in its comments on May 10th, the economic analysis provided by BLM in the February 1999 proposal did not comply with the requirements of the RFA or the court order. As we stated, the court ordered BLM to prepare an economic analysis that utilized the proper size standards and complied with the RFA. Although BLM consulted with Advocacy on size standards, it did not provided a coherent and meaningful analysis of the proposal and alternatives as required by the RFA.

Nothing in the supplemental proposed rulemaking changes or mitigates the inadequacies of the February 1999 proposal. If anything, the lack of clarity and information in the supplemental proposal exacerbates further the problems with BLM's treatment of the RFA and its procedure in this rulemaking.

In reviewing the "supplemental proposal" it is unclear whether BLM is soliciting comments for an advanced notice of proposed rulemaking or truly attempting to supplement its earlier February 1999 proposal. If it is soliciting information for an advance notice of proposed rulemaking to determine whether it will implement the NAS recommendations, Advocacy commends BLM on its decision to solicit comments to obtain information that incorporates the recommendations and also complies with the analytical process mandated by the RFA about the impact of the recommendations *prior to publishing the proposed rule*.

If, however, this is an effort at *finalizing* the original proposal, Advocacy is truly perplexed by BLM's procedure. Is BLM stating that it is planning to implement the NAS recommendations instead of the February 1999 proposal? If so, shouldn't BLM

[6] Id. at pp. 93-123.
[7] 64 FR57615-57617.

state clearly that this is the intent, withdraw the February 1999 proposal, provide specifics as to the means that it plans to use to implement the NAS recommendations, and provide an economic analysis of the supplemental recommendations as required by the RFA? Advocacy asserts that if this "supplemental rulemaking" is an effort to proceed directly to a final rule, even though the material modifies the proposal, then BLM would be in violation of both the RFA and the APA.

The Supplemental Rule Does Not Comply with the Requirements of the RFA

The Office of Advocacy asserts that the February 1999 economic analysis and the reopening of the February 1999 comment period is insufficient for the supplemental proposed rulemaking. BLM has not "identified which of NAS's recommendations it is considering nor provided any sort of analysis of the economic impact of the recommendations on small entities. BLM merely states that it prepared an IRFA and certified the proposed rulemaking in February 1999.[8] It states that it is reopening the comment period for the February 1999 proposal for 120 days. [9].

BLM's decision not to provide the information required by the RFA on the supplemental proposal is problematic. NAS provides recommendations that are alternatives to BLM's proposal that were not a part of the February 1999 economic analysis. For example, although BLM and NAS agree that financial assurance should be required for reclamation of disturbances to the environment caused by all mining activities beyond those classified as casual use, even if the area disturbed is less than 5 acres, the two organizations provide different solutions to the problem.[10] The 3809 proposed rule, which is the subject of the February 1999 economic analysis, provides an analysis of BLM's solution to the problem-minimum standard bond amounts determined by acreage. NAS recommends that BLM establish bond amounts by activity. In doing so, NAS surmises that bond amounts by activity recognizes that certain activities are less costly, as well as expedites the permit process and negates the need for detailed calculations based on an engineers report. Moreover, NAS encourages the use of bond pools to lessen the impact on small entities.[11]

What is it-with specificity-that BLM is considering? How can the public provide meaningful information?

[8] As the Office of Advocacy states in its May 10, 1999 letter on the proposed rulemaking in this matter, the economic document that BLM prepared did not meet the requirements of an IRFA or support BLM's finding of " no significant economic impact" as required for a proper certification. Advocacy reiterates its position on that issue.
[9] Id., at 57618.
[10] Id., at 57615.
[11] NAS study at p.95.

A FRFA Will Not Cure BLM's Noncompliance with the RFA

BLM states that if comments indicate that there will be a significant economic impact, it will prepare a FRFA to address the RFA issues. A FRFA on what?- is the question that BM has to answer. The RFA compels an agency to make a reasonable and good faith effort, prior to the issuance of a final rule, to inform the public about potential adverse effects of his proposals and about less harmful alternatives. Associated Fisheries of Maine v. Daley, 127 F.3d 104,114-115 (1st Cir., 1997); Southern Offshore Fishing Association v. Daley, 995 F. Supp. 1411, 1436 (M.D. Fl., 1998). Moreover, in Southern Offshore Fishing Association v. Daley, 995 F. Supp. 1411 (M.D. Fl. 1998), the court held that preparation of a FRFA, when an initial analysis had not been prepared, violated the RFA and APA because the public had not had an opportunity to review and provide comments on the information in the IRFA or the agency's alternatives.

In this instance, BLM is not telling the public what it is considering. If it is proceeding to finalize the original rule, it must first do an adequate IRFA, including an analysis of alternatives such as those recommended by NAS.

Conclusion

Before proceeding to a final rule, BLM must publish for public comment a new proposed rule if it is considering any of the NAS' recommendations. If BLM is considering finalizing the proposed rule, then it must comply with the Court's order and also publish an adequate IRFA that addresses the inadequacies in the economic analysis in the proposal, including alternatives. Failure to do so denies the public of its right to be fully informed during the comment period; frustrates BLM's attempt to obtain meaningful comments; and runs the risk that small businesses and BLM will have to spend valuable time and resources litigating this particular matter in the judicial system.

If you have any questions, please feel free to contact me at (202) 205-6533.

Sincerely,

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Chief Counsel
Office of Advocacy

Sincerely,

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